5-3100-9910-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

James M. Mersch, Petitioner,
v.
City of St. Paul, Respondent.

ORDER GRANTING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING

The above-entitled matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Hearing dated July 21, 1995. Terry Sullivan, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, submitted a Motion to Dismiss and supporting Memorandum on behalf of the Respondent, on August 8, 1995. Brian E. Cote, Esq., Sandra R. Boehm and Associates, Ltd., 2310 American National Bank Building, St. Paul, MN 55101-1808, submitted a Memorandum in Opposition to the Motion on behalf of the Petitioner on August 21, 1995. The record closed with respect to this Motion on August 28, 1995, the final deadline jointly agreed upon for submission of Memoranda.

ORDER

Petitioner's Responsive Motion for an Evidentiary Hearing on Respondent's Dismissal Motion is GRANTED. The hearing will be scheduled forthwith.

Dated this 26th of September, 1995.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

MEMORANDUM

BACKGROUND

Petitioner is an honorably discharged veteran who has been employed for an unspecified period of time as a Captain in Respondent's fire department. His job assignment included some kind of specific paramedic responsibilities which increased his compensation by ten percent. In March of 1995 he was stripped of these duties and the increased salary for unspecified reasons. He contends that this was a demotion in response to unspecified "alleged protocol violations". He seeks to challenge these allegations of misconduct and/or incompetency in a veterans preference hearing. His request that the St. Paul Civil Service Commission conduct such a hearing was denied by them in a very brief written Order on May 9, 1995. The Commission did not mention

the "alleged protocol violations" anywhere in its Order and it is not clear on this record that the Commission was even aware that such charges had been filed against the veteran.

On May 17, 1995, Petitioner filed this Petition with the Commissioner of Veterans Affairs, alleging violation of his veterans preference rights and seeking relief, including an Order that the Civil Service Commission conduct the veterans preference hearing he has been seeking. On July 21, 1995, the Commissioner of Veterans Affairs ordered a contested case hearing on this Petition. On August 8, 1995, Respondent filed the Motion considered herein asking the Administrative Law Judge to dismiss the Petition on grounds of: (1) lack of jurisdiction; (2) res judicata; and (3) election of remedies. Petitioner's response to the Motion requests an evidentiary hearing on that Motion pursuant to Minn. Rule 1400.6600.

DEMOTIONS

It appears firmly established in Minnesota that whenever a public employer proposes to demote or discharge a veteran, it must give the veteran an opportunity to contest the action at a hearing upon written charges of misconduct or incompetency. The leading case on demotions is Ammend v. Isanti County, 486 N.W.2d 3 (Minn. App. 1992). The dispute in that case turned on whether a veteran had been demoted by the County Sheriff (his victorious opponent in the recent election for that position) when he was told to take the "undersheriff" sign off his door and was reassigned to the least desirable duties available at the sheriff's office. The Administrative Law Judge concluded, in a report that was subsequently adopted by the Commissioner of Veterans Affairs, that the veteran had been demoted, even though his salary was not decreased and he was arguably technically simply reassigned to different duties within the same title or position of "deputy sheriff":

> It is the well settled responsibility of the law to pierce the titular veil. Substance must always prevail over mere designation of official titles. Hennepin County v. Brandt, 225 Minn. 345, 31 N.W.2d 5 (Minn. 1948). "Courts must particularly scrutinize claims of exemption from the Veterans Preference Act, because the legislature has unequivocally stated that the burden of proving the exemption is on the appointing authority." In Caffrey v. Metropolitan Airports Commission, 310 Minn. 480, 246 N.W.2d 637 (Minn. 1976), for example, the Court rejected the Commission's claim that Petitioner was a "department head" exempt from the Veterans Preference Act where petitioner's "department" consisted of one personal secretary. The law looks to the "de facto" nature of the position occupied by the Petitioner, rather than its characterization by the appointing authority. This doctrine can also cut against the veteran. In Huff v. Sauer, 243 Minn. 425, 68 N.W.2d 252 (Minn. 1955), for example, the Court held that the veteran was validly removed considering his "de facto" duties as a patrolman. Accord, Granite Falls Municipal Hospital and Manor Board v. State Department of Veterans Affairs, 291 N.W.2d 683 (Minn. 1980).

> It is often in the interests of an appointing authority to contend that a change in duties is not a demotion, particularly where the employer wishes to avoid trying to justify its actions at a hearing.

The Commissioner's Order in that case was affirmed on appeal by the Minnesota Court of Appeals:

> Although Minnesota Courts have not defined what it means to be demoted, Black's Law Dictionary defines demotion as a "reduction to lower rank or grade, or to lower type of position" Black's Law Dictionary, Fifth Ed. (1983).

See, also, Gonzales v. Ohio Bureau of Employment Services, 429 N.E.2d 448 (Ohio 1980) and Helgevold v. Civil Service Commission, 367 N.W.2d 257 (Iowa App. 1985).

On the other hand, it also appears well settled in Minnesota that the veteran is not entitled to a veterans preference hearing when the demotion is a good faith personnel decision which is not based on allegations of misconduct or incompetence. One of the earliest veterans preference cases uncovered dealing with the issue directly is Keding v. Anoka County, OAH Docket No. 5-3100-0426-2, April 28, 1986. Petitioner in that case was initially promoted to fill a supervisory position in the sheriff's department that was vacant because of a disciplinary action against his predecessor. When an independent arbitrator ordered the reinstatement of his predecessor, the county was forced to demote the petitioner to make room for the reinstated supervisor. The Administrative Law Judge held that the Petitioner was not entitled to a veterans preference hearing in that case because the reorganization was an "impersonal bona fide personnel decision dictated by circumstances beyond the control of the employer."

Three years later the Minnesota Supreme Court affirmed this interpretation of the Veterans Preference Act in a similar case, in Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989). The dispute involved several Ramsey County attorneys IV's who were reclassified as attorney III's at the same time in a reorganization of the Civil Service Classification System which was arguably related to an ongoing labor dispute. The Administrative Law Judge and the Commissioner of Veterans Affairs held that freezing the salaries and reclassifying the job titles downward appeared to be a demotion under the Veterans Preference Act, though the veterans' duties were not changed in any way by the reclassification. The Court of Appeals disagreed, citing California decisions focusing on whether the status is changed by a personnel board as opposed to an appointing authority and whether the employee "travels downward on a fixed matrix of defined jobs" as opposed to redefining the duties of jobs on the matrix. The Appeals Court decision was affirmed by the Minnesota Supreme Court which held that a demotion is a removal under the Veterans Preference Act, but disagreed with the conclusion of the Administrative Law Judge and the Commissioner that the reclassification in that case was a demotion, citing two guiding principles:

(1) Veterans must be protected from the ravages of a political spoils system, but ministerial and perfunctory reorganizations "will withstand scrutiny if based upon a reasonable exercise of administrative discretion".

(2) Courts must "examine the substance of the Administrative Decision rather than its mere form."

The Court concluded that there was no demotion in that case because the relative ranking of the employees viz a viz each other and their job duties and salaries were unchanged. It characterized the personnel decisions involved as a perfunctory act of coordinating actual positions with their appropriate classifications. The Court explicitly limited its decision to the facts at hand, where there was no bad faith or subterfuge involved. See, also, Ochocki v. Dakota County Sheriff's Department 464 N.W.2d 496 (Minn. 1991) and Dane County v. McCartney, 166 Wis.2d 956, 480 N.W.2d 830 (Wis. App. 1992) (must look at whether the reorganization was "pretextual" and whether there was a "permanent movement of an employee to a lower salary range").

The common thread of the above-discussed cases and the others dealing with alleged demotions of veterans is the need to base legal conclusions on all of the surrounding facts and circumstances. This was stressed in the very recent case of Wangen v. Rochester OAH Docket No. 5-3100-9755-2, August 23, 1995, adopted by the Commissioner of Veterans Affairs in an Order dated September 19, 1995. In that case the petitioning veteran's duties were substantially diminished in what the appointing authority called a "reorganization" which was deemed to be a demotion by the Administrative Law Judge and the Commissioner, even though there was no decrease in salary:

Such demotions are frequently held to be removals or discharges under Veterans Preference and Civil Service Laws, giving the employee a right to notice and hearing. [Citations omitted].

It is important in analyzing demotion cases to note the difference in treatment under Veterans Preference Statutes. A proposed demotion of an employee which might not be considered a removal or a discharge in an action for monetary damages in a wrongful discharge action, for example, could well be considered a removal for purposes of a Veterans Preference Petition, where the remedy is merely a hearing and an opportunity for due process.

The attached Report should not be misconstrued as holding that all demotions pursuant to reorganization plans involving veterans must always require a notice and hearing. As with many of the cases in this area, including those cited above, a proposed "reorganization" involving a demotion must be examined within the context of the surrounding facts and circumstances.

The Civil Service Commission decision states that it is based on seven letters from counsel and Article 31 of the union contract. Perhaps these documents contain some compelling rationale for concluding that stripping Petitioner of his paramedic duties and compensation was not a demotion. If so, that rationale is unfortunately not clearly stated in the Civil Service Commission's decision.

Consequently, the evidentiary hearing requested by the Petitioner is needed to assess the facts and circumstances surrounding the personnel decision in order to make a proper ruling on Respondent's Motion to Dismiss. There are a number of relevant factual matters which are unclear on this record. How long had the Petitioner been assigned the paramedic captain responsibilities? Did he have a legitimate expectation of permanency in this assignment? Was the reassignment to the position of lesser salary and responsibility a permanent or relatively permanent change? Did Petitioner's relative position change viz a viz. other similarly situated employees? Is there any evidence of politics or pretext or bad faith subterfuge involved? Are such rotations of paramedic assignments routine? If they are not routine, what were the reasons for the reassignment in this case and is there evidence that it was a "reasonable exercise of administrative discretion"? What is the evidence to support Petitioner's conclusion that the reassignment here was a response to "alleged protocol violations"? What has been the past practice of the appointing authority in dealing with protocol violations similar to those allegedly alleged herein?

JURISDICTION

Final judgment is properly reserved at this point on Respondent's jurisdictional objections until after the evidentiary hearing is completed. There is no doubt as a preliminary matter, that the Commissioner has the requisite authority to rule on Respondent's dismissal Motion.

The issue appears to have been resolved nine years ago in another veterans preference case involving the same Respondent, Jasper v. St. Paul, OAH Docket No. 2-3100-0842-2 (1986). In that case, Respondent contended that only the District Court had jurisdiction to rule on whether there had been a good faith abolition of the veterans position. The Administrative Law Judge overruled that contention, quoting from the majority decision in Young v. Duluth, 386 N.W.2d 732, 736-737 (Minn. 1986):

> It is evident from the language of the Act that the legislature intended to allow veterans to enforce their rights by either petitioning for a Writ of Mandamus under Section 197.46 or by requesting an Order from the Commissioner under Section 197.481.

The Courts and the Commissioner and Administrative Law Judges have always uniformly interpreted the statutes involved, in numerous cases filed every year, as directing both the District Court (by Writ of Mandamus) and the Commissioner (by Order, after a contested case hearing if need be) to Order local political subdivisions to conduct Veterans Preference hearings whenever it appears that veterans' rights to such hearings have been denied. The District Courts and the Commissioner do not conduct

the actual Veterans Preference hearing itself. They merely determine whether the hearing should be conducted by the local political subdivision in the rare case where it is alleged that the governmental unit seeks to demote or discharge a veteran without proving misconduct or incompetence. Such hearings are usually granted by civil service commissions as a matter of course, without any necessity of seeking recourse in the courts or from the Commissioner of Veterans Affairs.

In this case Respondent argues that the Commissioner is bereft of jurisdiction to order the hearing because the Petitioner applied for it first from the Civil Service Commission.

> "We submit that once having chose this provision, the jurisdiction of this issue fell to the St. Paul Civil Service Commission and remains under their control."

It is unclear why Respondent asserts that the St. Paul Commission retains jurisdiction over the proceeding. Their Order denying petitioner's request for a hearing does not explicitly purport to retain jurisdiction for any purpose. Indeed, the Commission's Order appears to reject a request that it assert jurisdiction over this controversy.

The common sense first step for an aggrieved veteran under the usual circumstances would be to request the hearing from the local civil service commission, rather than to petition the state Commissioner for an order requiring one. Indeed, Respondent appears to argue here that veterans cannot legally file a petition with the Commissioner under Minn. Stat. § 197.481 for an order compelling the local unit of government to hold a hearing until the local unit of government has previously denied a hearing request. However, Respondent appears to be further asking, in this Motion for Dismissal, for a ruling that once the veteran's request for a hearing is denied by a local commission, the decision would be final - the jurisdiction would remain with the local commission and "under their control".

Practically speaking, the Respondent apparently seeks to nullify the power of the Commissioner to Order a hearing under Minn. Stat. § 197.481. If the veteran and local government agree a hearing is proper, there will be one. If the local government opposed the hearing, the veteran could not petition the Commissioner for a hearing until s/he went first to the local government's civil service commission. If the civil service commission agreed with the veteran, there would be a hearing. If not, the civil service commission decision would be final and beyond the jurisdiction of the Commissioner of Veterans Affairs. The only appeal would be to Court, which would either approve the civil service commission decision or Order it to hold a hearing. The statutory authority of the Commissioner to order a local government to conduct a hearing would consequently be rendered a nullity.

The legislature has directed in Minn. Stat. § 645.16, that "every law shall be construed if possible to give effect to all its provisions." The evidentiary hearing ordered herein will give the Respondent an opportunity to clarify why its proposed interpretation would not violate this mandate.

RES JUDICATA

One thing that is unambiguously stated in the Civil Service Commission's decision is its disposition: "It is hereby ordered that the request . . .for a.veterans preference hearing is denied." They unequivocally refused the veteran's request to conduct a hearing.

In its dismissal Motion, Respondent now attempts to characterize the Commission's action as having conducted a hearing:

> "They have heard the matter and have made their determination." (Page 4). "The Petitioner, under Minn. Stat. § 197.46 has the right to charge a municipality with an improper removal and to have the matter heard by the St. Paul Civil Service Commission. This has been done." (Page 4). "This matter has been heard . . .." (Page 5) "If we rehear this matter. . .." (Page 6).

On the face of it there is a major inconsistency here. The evidentiary hearing will give the parties an opportunity to attempt to reconcile it.

The Commissioner of Veterans Affairs has applied res judicata principles in the past to dismiss petitions where there has been a court judgment on the merits, refusing to relitigate the dispute in a contested case hearing. In fact, he agreed with the Respondent that such a petition should be dismissed in the Jasper case, cited above, because the Petitioner had already pursued his mandamus remedy to conclusion in the District Court.

However, res judicata ordinarily applies only to judicial judgments, not to decisions of administrative agencies when there has been no judicial hearing or due process. CJS Judgments, Section 603 and 688. The same thing is true of rulings like this one made by hearing officers (Section 612).

There is serious question as to how much weight should be assigned and whether res judicata should adhere to decisions of civil service commissions. The problem was highlighted in Justice Simonett's concurring opinion in the Young case cited above.

> The issues involved here, which include preference, bad faith, and managerial prerogatives and policies, would seem to be best handled by the district court, not by a civil service commission or like panel. A lay panel is better equipped to deal with pure fact issues of incompetency and misconduct, which may be why the legislature limited the notice and panel hearing requirements to wrongful discharge cases. (386 N.W.2d at 740).

Respondent also appeared to echo this concern in a brief it filed with the Court of Appeals in the case of St. Paul v. LaClaire, 466 N.W.2d 5 (Minn. App. 1991) where it argued that the Civil Service Commission had failed to provide the City with a full and fair hearing:

> It is fundamental that, in all administrative adjudications of an agency charged with making a final decision . . . that all parties to the proceeding must be able both to present evidence, but also to have the opportunity to meet and challenge evidence that is adverse to their position. . . . As a matter of procedural due process, employee disciplinary hearings should be held by an independent hearing examiner (or administrative law judge), whose function it is to preside at the hearing and afterward prepare written findings of fact and conclusions of law for the Commission.. . .

ELECTION OF REMEDIES

The evidentiary hearing may also help to clarify Respondent's argument that this Petition should be dismissed because it violates the "election of remedies" doctrine. A basic element of that doctrine is set forth in CJS Election of Remedies Section 13:

> The pursuit of a remedy will constitute an election precluding the assertion of another remedy only where the two remedies are inconsistent with each other and not where they are consistent and concurrent.

Petitioner here appears to be seeking exactly the same remedy he requested of the Civil Service Commission: a veterans preference hearing.

HLK